

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 8 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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COMMISSIONER OF INCOME TAX

Versus

PAUSHAK LIMITED

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Appearance:

MR MIHIR H. JOSHI, Instructed by  
MR MANISH R BHATT for Petitioner  
SERVED BY RPAD for Respondent No. 1

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CORAM : MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE R.BALIA.

Date of decision: 17/02/97

ORAL JUDGEMENT (R.K.Abichandani,J.)

The following two questions have been referred by  
the Income Tax Appellate Tribunal, Ahmedabad for the  
opinion of this Court under Section 256(1) of the Income  
Tax Act, 1961.

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the order of assessment was to be treated as merged in the Appellate order even with regard to the issues not agitated before the appellate Authority?"
2. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the order dated 27th April, 1983 passed by the commissioner of Income Tax u/s 263 of the Income Tax Act, 1961 was liable to be set aside."

The matter pertains to assessment year 1977-78. The ITO had allowed certain benefits to the assessee under various provisions of the Act in his order dated 30.4.1979. The assessee preferred an appeal and the CIT (Appeals) partly allowed the same by his order dated 12.11.80. However, another Commissioner of Income Tax proceeded under Section 263 of the Act and by his order dated 27.4.1981, directed that the deduction under Section 80HH to the tune of Rs. 1,91,303/- and the deduction under Section 35(1) allowed by the ITO to the extent of Rs. 94,669/- on account of expenditure incurred in the earlier years on scientific research, should be withdrawn and the assessee's claim for depreciation on the WDV of the plant and machinery be recomputed and allowed after deducting the value of subsidy received and that the excess amount paid over WDV on plant and machinery purchased from the holding company shall be deducted before allowing depreciation. Against that order the assessee appealed to the Tribunal and the Tribunal allowed the appeal holding that the entire order of the ITO had merged in the appellate order of the CIT (Appeals) which was made on 12.11.80 and therefore, the order made by the CIT under Section 263 on 27.4.81 was invalid.

Chapter XX of the said Act deals with 'Appeals and Revision'. The appealable orders are enumerated under Section 46 of the Act. Under the said provision, any assessee aggrieved by any of the orders enumerated therein can prefer an appeal to the Deputy Commissioner (Appeals) or the Commissioner (Appeals) as stated therein. Obviously, in the appeals which are filed by the assessee against any order that is adverse to him, the assessee would not be challenging any finding

regarding deduction or depreciation, which may be in their favour. Therefore, in the appeal that was filed by the assessee before the CIT (Appeals), the three aspects which were already decided by the ITO in his favour would not have figured. Therefore, when the Commissioner exercised his power under Section 263 for taking up the ITO's order in revision as regards those three aspects on the ground that the decision in that regard was erroneous and prejudicial to the interest of the revenue, he had ample authority under that provision to adjudicate upon those aspects which never arose in appeal. The Tribunal was therefore, in error in setting aside the order of the Commissioner of Income Tax made under Section 263 of the said Act on the ground that the order of assessment should be treated as having merged with the appellate order dated 12.11.1980 which was earlier made by the CIT (Appeals).

In CIT Vs. Nanakram Sobhraj Mills - 209 ITR 283 while considering the doctrine of merger in the context of the revisional power of the CIT, this Court held that against the order which was made by the Income Tax Officer allowing the deduction claimed by the assessee, there was no appeal filed and therefore, it could not be said that the said order had merged into the order of the appellate Assistant Commissioner. It was therefore, held that the Commissioner of Income Tax could exercise his powers of revision under Section 263 of the Act against the order of the ITO allowing deduction to the assessee. We are in respectful agreement with the ratio of this decision.

Under the above circumstances, both the questions referred to us are answered in the negative in favour of the revenue and against the assessee. The reference stands disposed of accordingly with no order as to costs.

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